Supreme Court, U.S.
FILED
NOV 25 1996
CLERK

No. 96-486

In The

Supreme Court of the United States

October Term, 1996

ILA HARTSEL,

Petitioner,

vs.

MICHAEL B. KEYS,
INDIVIDUALLY AND IN HIS CAPACITY AS
MAYOR OF THE CITY OF ELYRIA, OHIO, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Sixth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner was a 27 year employee of the City of Elyria, finally rising to the position of office Supervisor of the City of Elyria Public Utilities Department. The Superintendent of that department was one Joseph Grace. Mr. Grace was the City's computer resource person, and his department housed the majority of the computers used by the various city departments. After various studies and surveys, the administration determined that it was necessary and desirable to upgrade the system.

In early spring of 1991, Petitioner herein supported the son of Mr. Grace in his unsuccessful bid to unseat the Mayor. The Mayor was fully aware of that support.

In the spring of 1992, Mr. Grace took a leave of absence to care for his ailing wife. Petitioner filled the void by acting as Superintendent of the department. She requested the Mayor to confirm her position of Acting Superintendent. The Mayor did so, giving her, in the process, a temporary salary increase of $13,000.00 per year, thus raising her salary from $32,000.00 per year to $45,000.00 per year.

In October 1992, Mr. Grace tendered his resignation to the City, and Petitioner requested the Mayor to make her appointment permanent. The Mayor indicated to her that he would consider her, but that, frankly, he was looking for a person who had computer expertise and that he would probably not make her position permanent. Again, on 21 December 1992, Petitioner requested that she be Superintendent of the department. The Mayor advised her that he was 99% sure that he would select someone with more computer expertise than she.

As a result of that conversation and as the result of office "grapevine," Petitioner felt that one Thomas Brand, who did have a great deal of computer expertise, would be selected as the new Superintendent. She assumed that she would have to train her replacement, although no one told her that. On December 31, 1992 at approximately 9:00 a.m. Petitioner tendered her resignation, effective at midnight that day, and turned in her keys to the building. As a long holiday weekend was about to begin, the Mayor wished to have someone of authority in place. He subsequently transferred Petitioner back to her permanent classification of office supervisor and appointed Thomas Brand Acting Superintendent, pending Civil Service Commission action.

Petitioner then filed her lawsuit, alleging, inter alia, gender discrimination, age discrimination, and a violation of her freedom of speech for supporting an opponent of the Mayor in the previous primary.

The District Court granted the Defendants' summary judgment, which the Sixth Circuit upheld and is now pending before this Court on petition for writ.

ARGUMENT

Under the *McDonnell Douglas Corp. vs. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed 2d 668 (1973) and its progeny, a plaintiff establishes a prima facie case and creates a presumption of discrimination by showing: (1) membership in the protected class; (2) that she suffered adverse employment action; (3) that she was otherwise qualified for the position; and, (4) that following the

plaintiff's rejection, the position was filled by a person outside of the protected class. This general framework applies to both gender and age discrimination.

Once the defendant makes that prima facie case, the defendant may offer any legitimate, non-discriminatory reason for the employment action. The plaintiff may rebut this with evidence of pretext. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 126 L.Ed 2d 407 (1993). The defendant need not *prove (emphasis added)* a non-discriminatory reason for not promoting Petitioner, but merely *articulate (emphasis added)* a valid rationale. *Id.* at 514.

Petitioner herself merely alleges that the defendants' given reasons were pretextual. And that, upon distilling her argument to its purest form, is what she is asking this court to declare. She asks this Court to overturn summary judgment in all ADEA cases when the plaintiff merely articulates pretext. Petition, p. 13, para. 2 She states " . . . the articulation of such a reason – in and of itself – creates an issue for the finder of fact."

We do not believe that this Court wishes to change to the plaintiff's proposed standard in ADEA cases. Such a standard would completely eliminate summary judgment and clog the trial courts with, as here, all manner of dubious claims. This case, on the facts, is clearly one which the Court should clear from the docket in a summary fashion. The facts, mostly from the mouth of Petitioner, establish the genuineness of the employer's proffered employment decision. She concedes in her own deposition that she could not program computers. She claims to know of the Mayor's discriminatory animus

because of her "women's intuition," "the tone of the whole situation," "just one of those things you feel," The Mayor's "body language," and "vibes." (Hartsel Depo.) Her further information came from the office "grapevine." The Circuit Court correctly noted that, as to gender discrimination, "Hartsel has failed to proffer sufficient information to put these extremely subjective and vague allegations in logical context, and has therefore failed to exceed the scintilla threshold to prevent summary judgment." App. 13, line 8.

In support of her age discrimination allegation, Petitioner offers the information that she "could not operate the computer, as far as putting the programs on and all this type of thing," and that "older workers didn't grow up with [computers] the way these kids are doing." Again, the Circuit Court declined " . . . this invitation to hold that requiring computer skills for a promotion is alone sufficient to create a prima facie case of age discrimination." App. 14, line 6. Petitioner, even under the reading of *Hicks supra,* has not submitted any evidence of pretext. She has shown, by all of her evidence, the genuineness of the defendant's reason for promoting another person.

Petitioner argues, somewhat disingenuously, that she does not wish this Court to review its decision in *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993), Petition p. 11, para. 2. But Petitioner then goes on at p. 13, para. 2, to urge the Court to do just that by asking that the Court find "the articulation of such a reason – in and of itself – creates an issue for the finder of fact." In fact, this Court held that the Plaintiff is entitled to an "opportunity to *demonstrate (emphasis added)* that the proffered reason for

the employment decision was not the true reason for the employment decision." *U.S. Postal Service Board of Govs. v. Aikens*, 460 U.S. 711, 716 (1983). Respondent submits that to "demonstrate" pretext does not mean merely to "articulate" pretext, and thus this Court should deny the petition.

CONCLUSION

Simply put, this Court should not abolish summary judgment as a tool for weeding out specious claims of gender and age discrimination. The standards previously announced in *Burdine, supra,* its progeny, and in *Hicks, supra,* are clearly proper and reasonable methods of evaluating the relative merits of a lawsuit. To change the standard, as the Petitioner here requests, to one which merely requires an articulation that the proffered reason was pretextual, instead of requiring a Petitioner to "demonstrate" that pretext, will cause a nightmare of litigation in the lower courts. Given this potential outcome, this Court should deny Petitioner's writ.

Respectfully submitted,

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